IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

SA.No. 336 of 2003(F)

AS.186/2001 of II ADDL.DISTRICT COURT,ERNAKULAM
OS.135/1998 of PRINCIPAL SUB COURT,KOCHI
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APPELLANT: APPELLANT/3RD DEFENDANT

BABY JOSEPH, W/O. JOSEPH,
THALASSERY HOUSE, ELAMKUNNAPUZHA P.O.,
KOCHI-682 503.

BY ADV. SRI.B.RAMACHANDRAN
SMT.S.SREEDEVI(ALP)

RESPONDENTS: RESPONDENTS/PLAINTIFF & DEFENDANTS 1,2,4 & 5
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1. K.A.ANTHAPPAN, AGED 75, S/O OUSEPH,
KEETHARA, GIRINAGAR, KOCHI-20.

*** 2. AGNES VARKEY, AGED 75,**
W/O. K.T.GEORGE, KEETHARA, GIRINAGAR,
KOCHI-20.

3. MARY, AGED ABOUT 60, W/O. ALFONS
VILIAMOOLATH HOUSE, AZHIKKAKOM,
KUMBALANGHI, KOCHI.

4. SAHIRA, AGED 40,
W/O. ABDULKHADER, NAS MANZIL, KAZHUTHUMUKKU,
THOPPUMPADY, KOCHI-5.

5. SELINA, AGED ABOUT 55, W/O. ANTONY,
KEETHARA HOUSE, PALLURUTHY VILLAGE,
KOCHI-6.

RESPONDENTS 2 TO 5 ARE DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT VIDE ORDER DT. 11.7.03 ON IA. 321/03.

BY ADV. SRI.TOM JOSE

THIS SECOND APPEAL HAVING COME UP FOR ADMISSION ON 11/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 336 OF 2003

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DATED THIS THE 11th DAY OF DECEMBER, 2007

JUDGMENT

Third defendant in O.S.135 of 1998 on the file of Sub Court, Kochi is the appellant. First respondent is the plaintiff and other respondents, other defendants. First respondent instituted the suit seeking a decree for declaration of title and partition claiming that plaint schedule property originally belonged to George @ Varkey who died issueless leaving behind second respondent(first defendant, widow) and first respondent brother and third respondent sister and they are the only legal heirs and each of them is entitled to a share. First respondent contended that widow is entitled to ½ share and respondents 1 and 3 are entitled to ¼ share each and the property is available for partition and is in their joint possession and enjoyment and is to be divided. It was also contended that it is brought to the notice of first respondent that appellant, exercising fraud, undue influence and collusion, got executed a sale deed in her favour as document 3558/45 and the sale deed is void and she is not entitled to any right and later appellant executed a sale deed in favour of 4th respondent which is also a sham and nominal

document. Only respondents 3 and 4 contested the suit. 4th respondent filed a written statement reiterating the contentions raised by appellant. Appellant in his written statement contended that second respondent widow is the sole legal heir of deceased Varkey and respondents 1 and 3 have no right over the property and 3rd respondent has relinquished her right after receiving valuable consideration and appellant purchased plaint schedule property from second respondent for valuable consideration and sale deed is not vitiated by fraud or undue influence and it was obtained after paying consideration and subsequently that right was assigned in favour of 4th respondent and plaint schedule property is not available for partition.

2. Learned Munsiff, on the evidence of PWs 1 & 2, Dws 1 and 2, Exts.A1 to A4, B1 and X1 and X2 found that plaint schedule property originally belonged to Varkey who died issueless in 1993 leaving behind second respondent widow and respondents 1 and 3, brother and sister as legal heirs. Though at the time of evidence, appellant produced Ext.B1 will and contended that under the will, only second respondent was entitled to a right in the property, and that right was purchased by appellant under Ext.A1 sale deed and later sold by appellant in favour of 4th respondent under Ext.A2, it was found that the

will was not proved and therefore under the will appellant is not entitled to contend that first respondent had absolute right over the property or appellant has exclusive right under Ext.A1. A preliminary decree for partition was passed. Appellant challenged that judgment before Additional District Court, Ernakulam in A.S.186 of 2001. Learned Additional District Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard. The argument of the learned counsel is that courts below should have found that only second respondent widow is having right over the property by virtue of Ext.B1 will and therefore it should have been found that under Ext.A1, second respondent assigned her right in favour of appellant which in turn was sold in favour of 4th respondent under Ext.A2 and therefore plaint schedule property is not available for partition.

4. The case is built up on Ext.B1 will. Learned Sub Judge and learned District Judge, on appreciation of evidence found that Ext.B1 will was not proved as the last will of deceased Varkey. Though DW2 was examined to prove the will, he did not depose that he was a witness to the execution of the will. In the

light of the evidence, courts below rightly found that execution of Ext.B1 will was not proved. If there is no will, it cannot be disputed that on the death of Varkey, half right devolved on second respondent widow and the remaining half share equally devolved on first respondent brother and third respondent sister. Courts below rightly granted the share accordingly. Appellant being an assignee of second respondent can only claim, the right which she had viz, half share of second respondent as found by courts below. In such circumstances, I do not find any substantial question of law involved in the appeal.

5. Learned counsel then submitted that as the value of the property was less than Rs.5000/-, on the date of institution of the suit after discharging the debt, courts below should have invoked the provisions of Section 33(A) of Indian Succession Act. First of all, such a contention was not raised in the written statement and if at all appellant has any such right, it is for him to claim it in the final decree proceedings.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-